

RECONSIDERING THE ISRAELI COURTS' APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN THE HUMAN RIGHTS CONTEXT

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I. INTRODUCTION

Discussions regarding the problem of identifying customary international law have essentially focused on two principal issues. The first relates to the inadequate manner in which the elements of custom reflect any empirical reality, or *lex lata*, particularly when according greater merit to the *opinio juris* of states.¹ Commentators have focused on a host of customary norms, in particular areas of international law, such as environmental law,² human rights³ and international economic law.⁴ These commentators have concluded that these so called *customary* norms serve as the jurisprudential basis of the relevant international laws are either not customary due to a lack of state practice or are too indefinite to be classified as any form of *hard* law. The second principal contention relates to the relative nature of the sources of custom. The basic problem, when

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1. See, e.g., Bruno Simma & Phillip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUS. Y.B. INT'L L. 82 (1992); Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995); Steven Zamora, *Is There Customary International Economic Law?*, 32 GERMAN YB. INT'L L. 9 (1989); Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

2. See Bodansky, *supra* note 1.

3. Simma & Alston, *supra* note 1.

4. Zamora, *supra* note 1.

delineating *opinio juris*, is that the very purpose and nature of customary law is being uprooted in deference to the perceived desires of states.⁵

In attempting to address these aforementioned contentions, some commentators tend to stress the unavoidably pluralist structure of the international community. Unique regional and cultural interests suggest the need for a broader understanding of custom that makes it difficult to identify a customary norm in any definitive manner.⁶ Recognizing the purpose of the key elements of custom, particularly the *opinio juris* of states, is to reflect the basic structure of a customary norm.⁷ Commentators have suggested that the distinction between *lex lata* and *lex feranda* has blurred.⁸ One, therefore, can claim that referring to *opinio juris* enhances the role of custom as an adjudicatory source. Discerning the values indicated in the *opinio juris* can provide a more clearer direction for a judicial body applying the customary norm than the strict positivist approach that tends to stress state practice.⁹

Considering the problems associated with customary international law, this article will account for the role of customary law within the domestic legal system of states and the extent of the domestic application of customary international human rights law. Applying customary international human rights law in the domestic sphere might raise different considerations than other areas of international law. Human rights serve to regulate a states behavior towards individuals found within its borders. A morally consequential form of reasoning regarding the utility of human rights might incline a domestic legal actor towards different interpretations of customary law. For example, a court might account for the underlying purpose of human rights by considering broader sources when identifying the obligation derived from customary international law.¹⁰

Following a discussion of the more general problems associated with discerning customary international law, this article will consider Israel's legal framework for incorporating customary international law. This

5. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); Simma & Alston, *supra* note 1.

6. ANTONIO CASSESE, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 88 (Cassese & Weiler eds., 1988).

7. See generally, MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); ABI-SAAB, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 10 (Cassese & Weiler eds., 1988).

8. BROWNLIE, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 70 (Cassese & Weiler eds., 1988) noting the importance of political circumstances, the catalytic effect of certain statements, and the modalities of application.

9. See also Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. L. STUD. 85 (1996).

10. Isabelle Gunning, *Modernising Customary International Law: The Challenge of Human Rights*, 31 VA. J. INTL. L. 211 (1991) (sovereign enacts human rights for benefit of community and not as a reflection of an exercise of power).

article will account for the manner in which the Israel legal system, particularly the Israel Supreme Court, has applied customary international law and the implications of such an approach for the future application of customary international human rights law in Israel.

The reason for this focus on the Israeli system is that the Supreme Court tends to place a rather strong emphasis on the state practice element of custom. The positivist comprehension of the Court, however, tends to reflect the problems associated with this approach. In particular, the Court has been prone to subjective interpretations of the relevant norms and, at times, an unrealistic perspective of the customary status of certain rules.

Furthermore, the Courts approach does not appear to conform with its underlying reasoning for incorporating international customary law into the domestic Israeli law.¹¹ The significance of customary law for Israeli jurisprudence is that custom creates an obligation on the sovereign state.¹² The state does not maintain an extra-legal status above the strictures of the law, and therefore customary international norms can provide a common core of binding human rights. This suggests a cosmopolitan international framework for human rights, as opposed to an inter-statist approach generally associated with a positivist perspective.¹³ A reference to the *opinio juris* of states might provide a clearer adjudicatory source of custom than would state practice.

This re-examination of the domestic applicability of customary international human rights law in Israel also seems ripe given Israel's ratification of the principal human rights treaties during the early part of this decade. For example, Israel ratified the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, Convention on the Rights of the Child, Convention to Eliminate Discrimination Against Women, and the Convention Against Torture. Coupled with the enactment of two important Basic Laws¹⁴ that strength the status of civil rights in Israel,¹⁵ one can consider the applicability of provisions within these ratified but non-incorporated treaties¹⁶ that embody customary international law.

11. As compared to a treaty that generally must be incorporated pursuant to a specific statute.

12. See discussion *infra*. The Israel Supreme Court has also identified the fact that Israel is a mixed jurisdiction as another reason for incorporating custom.

13. Dower, *Human Rights and International Relations*, 1 INT'L J. HUM. RTS. 86 (1997).

14. See, e.g., Karp, *Basic Law: Human Dignity And Freedom – A Biography of A Power Struggle*, 1 MISHPAT UMEMSHAL 323 (1992) (in Hebrew).

15. David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 14 NETH. Q. HUM. RTS. 173 (1996).

16. Ruth Lapidoth, *International Law Within the Israel Legal System*, 24 IS. L. R. 451 (1990); Yeffa Zilbershats, *Role of International Law in Israeli Constitutional Law*, 4 MISHPAT UMEMSHAL 47 (1997) (in Hebrew); Rubin, *Adoption of International Treaties into Israeli Law by Israeli Courts*, 13 MISHPATIM 210 (1983-84) (in Hebrew).

II. CUSTOMARY INTERNATIONAL LAW AS A SOURCE

Customary international law is composed of an objective element regarding the actual practice of states, and a subjective element that the state believes it is acting under a legal obligation, otherwise referred to as *opinio juris*.¹⁷ One of the key problems in discerning custom is the independent relative importance of each of these elements and the proper reference materials for determining their normative content. For example, customary international law has been prone to uncertainty as a viable source of law given the difficulty in identifying state practice or the vague nature of *opinio juris*.¹⁸ This form of criticism gained credence particularly after a variety of International Court of Justice [hereinafter "ICJ"] decisions emphasized the importance of ancillary sources, such as UN Resolutions, to establish the grounds for the *opinio juris* of emerging customary norms.¹⁹

In response to this problem, some commentators have adopted a more realistic approach towards customary law by accounting for factors such as international relations²⁰ that causally persuade states to engage in similar behavior due to surrounding economic or political circumstances rather than from a binding legal obligation. Alternatively, other commentators point to the importance of upholding a viable international legal system by stressing a strong statist paradigm²¹ or focusing on other international law sources, such as treaties, as an efficient normative source for developing a state's customary law obligations.²² One of the key reasons for referring to treaties as a source of custom is that with the lessened homogeneity of states and the increased need for clear and effectively responsive international doctrine resulting from the growing inter-dependency of states. Custom has been deemed a rather slow and cumbersome source for developing international law.²³ Because treaties are a written instrument and provide for a deductive application of predetermined rules, they can serve as a key source for entrenching a customary human right. As

17. See, e.g., *North Sea-Continental Shelf Cases (FRG/Denmark;FRG/Netherlands)*, 1969 I.C.J Rep.

18. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995).

19. See, e.g., *Merits, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 ICJ Rep. 14.

20. See, e.g., Fidler, *Challenging the Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERM. Y.B. INT'L L. 198 (1996).

21. Weil, *supra* note 5.

22. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983); Leslie Deak, *Customary International Labour Laws and their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1, 11-12 (1994).

23. See, e.g., THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); VAN HOOFF, *supra* note 22.

acceptance and application of treaties develop, one can elicit an *opinio juris* by states concerning the treaty obligations, and, as states interact with the international bodies established under the treaties, a subsequent change in state practice.²⁴

In the international human rights field, there is also a tendency to rely on statements and declarations made by states in international forums or during the drafting of an international document.²⁵ Considering the broad range of available sources for deriving international norms, such as United Nations General Assembly Resolutions²⁶ or reports from Non-Governmental Organizations [hereinafter "NGO"], human rights commentators attempt to expand the reach of customary international law.²⁷

One of the basic problems with relying on sources derived from international organizations is that it tends to reduce the normative basis of international law.²⁸ States might support a particular idealistic notion in international forums but hesitate to uphold those ideals in practice. Hence while it is tempting for states to designate a particularly horrific act, such as torture, as being prohibited by customary law, it is equally important to provide for the enforcement of the norm in a realistic and effective manner.²⁹

Nonetheless, the alternative, positivist, approach tends to overlook the benefits of referring to *opinio juris*. As an adjudicatory tool, *opinio juris* can assist the judicial determinacy of the norm by clarifying the underlying value of the norm. Custom derives from a shared understanding of states and, particularly in the human rights field, fundamental principles that structure the evolution of customary norms.³⁰ As a result, there is a certain amount of commingling between the elements of state practice and *opinio juris* when considering the customary law status of a human right norm.

One can demonstrate the significance of *opinio juris* as assisting to apply a customary rule in a uniform manner upon considering the enforceability of custom in the domestic legal framework of the majority of

24. See discussion *infra*. The drawback to this approach is that a treaty is a separate source of law, such that its utility as a source of custom will depend on the number of states ratifying and incorporating the treaty in question.

25. MERON, *supra* note 7; Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM RTS.J. 53 (1990).

26. Sloan, *General Assembly Resolutions Revisited (Forty Years After)*, 58 BRIT. Y.B. INT'L 39 (1987) (discussing the relationship between GA Resolutions and custom).

27. MERON, *supra* note 7.

28. Weil, *supra* note 5.

29. Weisburd, *supra* note 18.

30. Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INTL. L. 211 (1997) (asserting that, in certain instances, consideration of state practice can be a facilitative factor rather than a necessary exercise).

states.³¹ While application of the customary norm in the domestic sphere might be subject to different interpretations, the underlying values that shape and form the rule can serve as guidelines for a domestic entity charged with enforcing customary principles.³² Considering the *opinio juris* of a customary law enhances judicial determinacy and with it the rule of law while allowing for a relative application of the norm.³³ A better understanding of the application of customary norms in domestic legal systems, notably in Israel, will clarify the reason for stressing a unitary basis for the substantive dimension of the source of custom.³⁴

States generally accept the automatic incorporation of customary international law into the domestic legal sphere. In Germany for example, Article 25 of the Grundgesetz, or Basic Law, binds the states to uphold customary international law. The courts look to the Federal Constitutional Court, or Supreme Court, to determine whether a norm has attained the status of custom.³⁵ In Italy, customary international law also maintains a normative status that places it above the domestic law.³⁶ While it is difficult to disentangle instances in which the courts have referred exclusively to custom as opposed to constitutional principles, the courts have referred to the customary international law status of the right to housing, own property, equal protection of the law for aliens, and the right against discrimination.

The United States arguably³⁷ recognizes that international customary norms are applicable in its domestic courts, with some commentators

31. See, e.g., *Enforcing International Human Rights in Domestic Courts* (Conforti & Francioni eds., 1997).

32. See, e.g., ABI-SAAB, *supra* note 7 (noting that the elements of custom can provide the procedure for creating and discerning the rule).

33. Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1992) (concluding that the lack of application of customary law is partly due to insufficient precision of the norms).

34. Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J.L. STUD. 85 (1996) (for example equates a similar interpretation with the international legal systems goal to achieve peaceful coexistence among states).

35. Note that unlike the United States and United Kingdom, domestic legislation in Germany cannot override a customary international norm.

36. FRANCIONI, *THE JURISPRUDENCE OF INTERNATIONAL HUMAN RIGHTS ENFORCEMENT: REFLECTION ON THE ITALIAN EXPERIENCE IN ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS*, (Conforti & Francion eds., 1997).

37. Some commentators assert that domestic courts generally do not abide by customary norms, and where they do, it is limited to specific instances involving maritime law cases. Trimble, *supra* note 1; Weisburd, *supra* note 18, (citing *United States v. Alvarez Machain* 112 S.Ct. 2188 (1992) and *Stanford v. Kentucky*, 492 U.S. 361 (1989)); Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

asserting that custom supersedes prior federal law.³⁸ The principle, as noted in the United States Courts, is the binding nature of international rules over sovereign states.³⁹ While reference to customary law by United States Courts has been rare, as well as subject to controversy,⁴⁰ customary international human rights norms have served as the basis for a number of legal actions.⁴¹ Customary international law maintains a similar status in Chile⁴² and Argentina.⁴³

The United Kingdom considers customary international law to be part of the domestic law, save if it conflicts with an existing law.⁴⁴ Canada also adheres to a similar adoptive approach to customary law.⁴⁵

A. Customary International Law in Israel

In Israel, like the United Kingdom, custom has automatic binding status in the domestic law⁴⁶ unless the customary norm is contrary to an

38. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Lillich, *supra* note 25.

39. This notion can be traced back to *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). The most widely cited case is *The Paquette Habana*, 175 U.S. 677 (1900). The proposition that it stands for automatic incorporation of customary law is subject to debate on both historic and legal grounds. See, e.g., Trimble, *supra* note 1; Weisburd, *supra* note 18; Bradley & Goldsmith, *supra* note 37.

40. Cf. Weisburd, *supra* note 18 with Lea Brilmayer, *Federalism, State Authority, and the Presumptive Power of International Law*, 1994 SUP. CT. REV. 295 (1995).

41. For example, the Alien Tort Statute provides that an alien may raise a tort claim against another alien who committed breaches of the law of nations. See e.g., Bayefsky and Fitzpatrick, *supra* note 33.

42. VICUNA & BAUZA, THE IMPLEMENTATION OF THE INTERNATIONAL LAW OF HUMAN RIGHTS BY THE JUDICIARY; NEW TRENDS IN THE LIGHT OF THE CHILEAN EXPERIENCE IN ENFORCING HUMAN RIGHTS; *supra* note 36, at 135.

43. VINUESA, DIRECT APPLICABILITY OF HUMAN RIGHTS CONVENTIONS WITHIN THE INTERNAL LEGAL ORDER THE SITUATION IN ARGENTINA IN ENFORCING HUMAN RIGHTS; *supra* note 36, at 149.

44. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1995); Andrew J. Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution*, 43 INT'L & COMP. L.Q. 537.

45. BAYESKEY, INTERNATIONAL HUMAN RIGHTS LAW IN CANADIAN COURTS; *supra* note 36, at 295.

46. Ruth Lapidoth, *International Law Within the Israeli Legal System*, 24 ISR. L. REV. 451 (1990); Yaffa Zilbershats, *The Adoption of International Law into Israeli Law: The Real is Ideal*, 25 ISR. Y.B. HUM. RTS. 243 (same article in Hebrew - 24 MISPATIM 317 (1994/95); *Zilbershats Role of International Law in Israeli Constitutional Law*, 4 MISHPAT UMEMSHAL 47 (1997) (in Hebrew); Rubin, *Adoption of International Treaties into Israeli Law by Israeli Courts*, 13 MISPATIM 210 (1983-84) (in Hebrew); *Shtampfer v. Attorney General*, 10 PD 5 (1956) (sovereign state is required to abide by customary law).

existing law.⁴⁷ In determining the criteria for establishing customary international law, the Israeli Courts have turned to Article 38(1)(b) of the statute of the ICJ.⁴⁸ The Article defines custom as a stable, consistent, and general practice that is broadly acknowledged in international circles as binding, with an emphasis on the fact that the norm has acquired binding legal force in the majority of nations.⁴⁹ An ambiguous provision in the domestic law will impel the Israeli Courts to incorporate a customary international norm into the domestic law,⁵⁰ with the presumption that the legislature is acting within the dictates of a customary norm.⁵¹

While the Israeli Court acknowledges the importance of *opinio juris* as demonstrating a state's sense of obligation, the Court tends to stress state practice as a key part of the doctrine of custom. Adhering to a standard that the practice must be established, general, and constant, the Israeli Supreme Court states it is the practice of the subjects of international law, i.e., the states, that is to serve as the key aspect in establishing custom.⁵² The Israel Supreme Court noted that the basis for establishing custom cannot be the values emerging from international entities since the latter do

47. Ruth Lapidot, *International Law Within the Israeli Legal System*, 24 ISR. L. REV. 451 (1990) (citing *Steinberg v. Attorney General*, 5 PD 1061 (1951), noting that a governmental regulation might be subject to customary law, referring to *dicta* in *American-European Beth-El Mission v. Minister of Welfare*, 21 (ii) PD 325 (1967) (regulation conflicted with right to freedom of religion). A similar idea applies in the United States, see Michael Glennon, *Raising the Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1986).

48. See, e.g., *Abu Itta v. Commander of Yehuda and Shomron*, 37(ii) PD 197 (1983) at 231. Note that international commentators have criticized Article 38(1)(b) as being defective because the definition is inverted; general practice is evidence of custom. See, e.g., Fidler, *Challenging the Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERM. YB. INT'L L. 198 (1996). Karol Wolfke asserts that the travaux préparatoires to the ICJ Statute indicate that the drafters had no clear idea regarding the structure of custom. Wolfke, *Custom In Present International Law* (1993).

49. Ruth Lapidot, *International Law Within the Israeli Legal System*, 24 ISR. L. R. 451, 454 (1991) (citing to *Abu Itta v. Commander of Judea and Samaria*, 37 (ii) PD 197 (1983). Cf. Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISR. L. R. 136 (1994) noting a possible different standard for proving customary humanitarian norms. See, e.g., *Taha v. Minister of Defense* 45(ii) PD 45 (1991) at 52-54.

50. *Hilu, et. al. v. State of Israel, et. al.*, 27 (ii) PD 169 (1973) at 177. See also, *Affu, et. al. v. Commander of IDF Forces in the West Bank, et. al.*, 42(ii) PD 4, 35, 76 (1988) (translated in 29 ILM 139); *Shimshon v. Attorney General*, 4 PD 143 (1951) (apply international law where legislature did not consider the succession of the state to the Mandate requirements).

51. Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISR. L. R. 136 (1994), citing 2 BARAK, *Interpretation of Law*, 576, 580 (1993); 3 BARAK, *Interpretation of Law*, 354 (1993).

52. See, e.g., *Abu Itta v. Commander of Yehuda and Shomron*, 37(ii) PD 197, 238-39 (1983).

not address the putative customary values in any practical sense. Although ideals are an important indicia of custom, state practice represents a more realistic and entrenched element.⁵³

Following this approach, the Supreme Court tends to apply custom in a somewhat subjective fashion. For example, the Court has repeatedly held that the Fourth Geneva Convention is not customary law and therefore inapplicable.⁵⁴ Alternatively, the Court has relied on subjective applications of military necessity to avoid the possible customary obligations of the state.⁵⁵

Professor Benvenisti explained the Supreme Court's understanding of custom as an attempt by the Court to counter-balance the lack of other avoidance doctrines in Israeli jurisprudence, such as the act of state or political question doctrines. He also interprets the Courts narrow application of custom as reflecting a desire to incorporate a deference to the national security considerations confronting the state.⁵⁶

The noted reasons for favoring a strict interpretation of customary law however are descriptive only. They refer to domestic interests that might apply only after determining the existence of a customary norm.⁵⁷ Hence, while the act of state doctrine might provide a basis for narrowing the application of customary law, such an argument ignores the functional purpose of custom in international and domestic law as creating a recognized set of common principles among states. Additionally, domestic standards of national security need not be central factors when considering the relevance of customary international human rights since customary international human rights norms can assist to shape the contours of security considerations in a manner that conforms with international law.

Furthermore, the Supreme Court's interpretation of state practice appears to be excessively literal and seems to overlook the role of international sources that shape the practices of states and define the contours of the customary law. Determining state practice is not a literal

53. *Id.*

54. See, e.g., *Shahin et al. v. Commander of IDF Forces in the Area of Judea and Samaria*, 41(i) PD 197 (1987) (family re-unification is not an obligatory right nor is it covered by the Fourth Geneva Convention); *Kwasama v. Minister of Defense*, 35(i) PD 617 (1981) (prohibition of expulsion only applies to mass expulsions under the Geneva Convention).

55. *Taha v. Minister of Defence*, 45(ii) PD 45 (1991) (state may fine parents if their children commit disturbances in the Occupied Territories).

56. EYAL BENVENISTI, *THE ATTITUDE OF THE SUPREME COURT IN ISRAEL TOWARDS THE IMPLEMENTATION OF THE INTERNATIONAL LAW OF HUMAN RIGHTS IN ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 207, 213-14 (Conforti & Francioni eds., 1997); Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 *ISR. L. R.* 24 (1992).

57. See, e.g., *Matar v. Minister of Defense*, 43(iii) PD 542 (1989), where the Israel Supreme Court held that the Geneva Convention is not customary law and that deportations of individuals associated with terrorist organizations may occur in the interest of national security.

exercise but accounts for a broader more objective view of custom.⁵⁸ Instances might occur whereby states entertain strong *opinio juris*, such that the material practice is a secondary consideration that might not reflect the emerging customary standard.

If one were to adhere to a strict account of state practice in the domestic sphere, it is conceivable that states would reject almost all customary norms because of contrary state practice. For example clearly states consider torture to be an unacceptable act under customary international law, yet the practice of torture still unfortunately abounds. Similarly, as decided in the *Nicaragua* case, the ICJ relied on the prohibition of the use of force in the United Nations Charter as a customary norm despite contrary state practice. The ICJ relied on the manner in which states tend to justify their acts of force, by denying any breach of the Charter or attempting to justify their actions as falling within the framework of the Charter. It did not however limit the examination to a hard-look at state practice.⁵⁹ Furthermore the ICJ noted that while regularity of behavior is important, there is no need for complete uniformity of behavior⁶⁰ particularly concerning human rights, which the ICJ has intimated can derive from customary law sources.⁶¹

While the focus on the actual practice of states is proper since it is the states that create and uphold custom, actual practice does not adequately account for developments within international organizations. Commentators have deemed a variety of United Nations Resolutions as reflective of custom, or at the very least as guidelines for the proper conduct of states that can reflect the development of a customary norm.⁶² This argument is significant given the large number of states that have emerged following the creation of the United Nations, thereby suggesting a

58. Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75) (defines state practice as any act or statements by a State from which views can be inferred about international law).

59. A similar approach was indicated in the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. (when the ICJ deemed the Geneva Conventions equivalent to customary law given the large number of states that have signed the document and the *opinio juris* deriving from statements made in international forums).

60. The fact that the ICJ was dealing with the prohibition regarding the use of force might account for its rather elastic interpretation of the development of a customary norm. See, e.g., D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987).

61. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), (1980) I.C.J. Rep. 3, para. 91; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), (1986) I.C.J. Rep. 14, para. 267. See also, Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L COMP L.Q. 321 (1989) (interpreting the ICJ cases as recognizing the customary status of a variety of human rights).

62. Danilenko, *The Theory of Customary International Law*, 31 GERM. Y.B. INT'L L. 9 (1988).

different pattern for, and relevance of, the elements of custom. Given the organizational role of international entities that influence the procedural development of custom, international forums can offer a strong platform from which to discern the existence or emergence of a customary norm.⁶³

International forums also serve to consolidate a variety of international interests, including the individual and other interest groups, such as NGOs, that operate in the human rights arena. Unlike other customary international laws that might derive from the actual state practice between states, human rights norms involve the actions of different actors and set of interests, further intertwining state practice and *opinio juris*.

It appears that discerning custom for the Israel Court becomes a comparative exercise of domestic law of states, at the expense of other international law sources.⁶⁴ In reality, *custom* for the Supreme Court seems to be the third source of international law mentioned in the ICJ statute,⁶⁵ namely the general principles of international law. General principles differ from custom in that the former entail an examination of the national legal systems of states to obtain a common core of fundamental principles that are necessary in a legal society.⁶⁶ While general principles can assist to find and interpret a customary principle,⁶⁷ the focus is on national legal systems in an attempt to discern a fundamental legal norm, a rather different approach than custom, which is a less obvious source of law that applies to a broader range of circumstances.⁶⁸

Recognizing the inclination in Israel towards a *realist* approach to custom, finding the proper grounds for the domestic application of a customary principle that also incorporates recent developments in the international arena might be difficult. While the substance of a customary rule might derive from international sources, the authoritative basis for applying custom in the domestic sphere clearly is derived from a domestic source of law.⁶⁹ Hence even when the Court considered international

63. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

64. See, e.g., *Taha v. Minister of Defence*, 45(ii) PD 45 (1991) (where the Israel Supreme Court referred to the domestic laws of other states to demonstrate that a state may control the oversight that parents are to maintain over their children).

65. Article 38(1)(c).

66. M. Cherif Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT'L L. 768 (1990); Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilised Nations*, 51 AM. J. INT'L L. 734 (1957); Linda J. Maki, *General Principles of Human Rights Law Recognized by all Nations: Freedom From Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L. J. 272 (1980).

67. Bassiouni, *supra* note 66.

68. But see Simma & Alston, *supra* note 1.

69. Harold Maier, *The Authoritative Sources of Customary International Law in the United States* 10 MICH. J. INT'L L. 450 (1989).

sources that might assist to indicate the practice of states,⁷⁰ deference was accorded to the domestic interpretation of customary international law. As noted by Israel Supreme Court Justice, Professor A. Barak, regarding the applicability of customary international law: "As long as there is no development of practical customary international law, there is no escape from the fact that every state is to apply the accepted measure for this matter pursuant to the dictates of its domestic laws."⁷¹ It is therefore important to understand why the Israel Supreme Court prefers to accord custom a particularly elevated status. It is possible that the particular reasons for upholding the direct application of customary international law in the domestic sphere might broaden the reference to custom in other situations that not only consider state practice, but also account for the international framework and Israel's obligations that derive therefrom. This functional understanding of custom will assist to elucidate the normative theory of adjudication adopted by the Court, thereby making it easier to expand on the importance of relying on a broader set of elements when determining the substantive basis of custom.

B. *The Principles Behind the Rule*

In *The Queen of Right in Canada v. Edelson and others*,⁷² the Israel Supreme Court outlined the underlying rationale for the automatic application of custom in the domestic law.⁷³ The first reason noted was that Israel mirrors the United Kingdom common law, particularly as a result of the Israeli Legislature's adoption of the previous Mandate Law. The result is that Israel law provides for automatic acceptance of customary law principles without the need for enabling legislation.

While this might be a practical reason for incorporating custom, it does not provide any particular rationale for the rule. Furthermore, it can possibly lead to skewed decisions since it might bind the Israel Courts to interpretations that cannot deviate from the United Kingdom law, even if there is no contrary law in Israel.⁷⁴ Nonetheless, one may stress here the distinction between the substantive basis of custom, that would provide the outline of the rule, and the authoritative basis of custom, that would serve as the interpretative guide for binding the domestic courts. Professor

70. *Shahin et al. v. Commander of IDF Forces in the Area of Judea and Samaria*, 41(i) PD 197 (1987) (right to enter country based on subjective interpretation of the Geneva Conventions and narrow interpretation of human rights treaties).

71. *Her Majesty The Queen in Right of Canada v. Edelson and others*, Takdin-Elyon, 97(2) P.D. 5757-58 (1997) (translation from author) [hereinafter *Edelson*].

72. *Id.*

73. Although the Court did not base its reasoning on this point, the Court referred to customary international law because there was no other source of legislation.

74. Lapidoth, *supra* note 16 (noting this reason in discussing *Shtampfer v. Attorney General* 10 PD 5 (1956)).

Dinstein has noted that the basis for incorporating custom can derive from the approach of the United Kingdom common law, however that does not bind Israel to the United Kingdom domestic laws since application of the rules derive from a domestic interpretation of the international sources.⁷⁵

Another reason offered by the Supreme Court focused on the notion that Israel is a *mixed jurisdiction*.⁷⁶ Justice Barak for example has stated that Israeli law is a mixture of civil and common law characteristics that has made it a unique legal jurisdiction. Legal sources are based on legislative codes, the central role of the judge and academia, domestic customs, comparative law, a fine balancing between a systematic and casuistic approach, and unique procedural aspects such as the integration of civil and religious law.⁷⁷ Hence, customary international law can serve as a key source for developing domestic Israel law.⁷⁸

This *mixed jurisdiction* approach explains the Supreme Court's tendency towards state practice in other jurisdictions rather than referring to international developments. The Court understands custom as a source by which to buttress the existing law rather than treat it as a wholly separate normative framework. In the decision *The Queen of Right in Canada v. Edelson and others*,⁷⁹ the Supreme Court recognized the customary notion of restrictive immunity for states, yet noted that the norm is to be applied in a manner that conforms with both international law and the basic legal values of the Israeli law.

In the context of customary international human rights, custom can interpret domestic legislation where the law is either unclear or requires clarification.⁸⁰ Pursuant to this reasoning, customary international human rights can serve as an important source for domestic interpretation, something that the Supreme Court has been hesitant to recognize.⁸¹

An additional, and important, reason for invoking customary international law in the domestic sphere is that a sovereign state has the responsibility to uphold its international obligations.⁸² Because custom is a

75. DINSTEIN, *INTERNATIONAL LAW AND THE STATE* (1971) (in Hebrew).

76. *Id.*; Barak, *The Israeli Legal System - Its Tradition and Culture*, 40 MISHPATIM 197 (1991) (in Hebrew).

77. Barak, *supra* note 76.

78. Barak, *Human Dignity as a Constitutional Right*, 41 HAPRAKLIT 271 (1993/94) (in Hebrew); *supra* note 49.

79. Takdin-Elyon, *supra* note 71.

80. Barak, *supra* note 76.

81. Benvenisti, *supra* note 49.

82. See *supra* note 71; see also, *Her Majesty The Queen in Right of Canada v. Edelson and others*, Takdin-Elyon, Vol. 97(2) 5757/5758-1997. See also, Rubin, *Adoption of International Treaties into Israeli Law by Israeli Courts*, 13 MISHPATIM 210 (1983-84) (in Hebrew) mentions this as a key reason for upholding customary law in the domestic sphere.

prime source for such responsibility, it is incumbent on the courts to apply the responsibilities that are derived from customary norms.

While this reasoning is valid given that the state is the principal international actor, one also must account for current developments in international law. The notion of state sovereignty has undergone a change due to the emergence of a variety of international developments such as environment law and human rights.⁸³ Given the role of international organizations as key bodies for defining the obligations of the state, the importance of referring to the doctrines emanating from international organizations has increased. This increase is most apparent when attempting to derive the customary obligations of a sovereign state.⁸⁴

Further, the Israel Supreme Courts reasoning demonstrates that sovereignty is only a smaller piece in the larger international puzzle. The law limits the activity of the state since the sovereign is a creature of the law and not the master of the law. Sovereignty is not an extra-legal principle that allows the state to act as it sees fit. Rather, as recognized by the Supreme Court, sovereignty is a means to an end within the international normative system, particularly when considering the role of human rights and its domestic enforcement.

C. *The Practical Applicability of Custom*

The rationale of the Israel Supreme Court for directly incorporating customary international law into the domestic law is based on the state's responsibility as a sovereign and the constitution of Israel's legal system as a *mixed jurisdiction*, being composed of elements of common and civil law. One may now consider the practical applicability of custom in the domestic sphere.

From a sovereign responsibility standpoint, what of the importance of democratic or majoritarian rule, whereby the legislative branch is to pass laws?⁸⁵ Surely a sovereign state has an obligation to be true to the mechanisms created by the internal political framework. It seems a counter-majoritarian notion even to allow for the enforcement of a rule that the legislative branch did not consider.⁸⁶ This was the rationale of the

83. Daes, *Status of the Individual and Contemporary International Law* E/CN.4/Sub.2/1989/40 (1989); Martti Koskeniemi, *The Future of Statehood*, 32 HARV INT'L L. J. 397 (1991) (noting role of international law as facilitating development of human rights while acknowledging important role of state to implement norms); Kahn, *The Extinction of Nation States*, 7 AM. U. J. INT'L L. & POL. 197 (1992) (role of state decreased with growth of international organizations and human rights).

84. Gunning, *supra* note 10 (outside parties, such as international organizations and NGOs, influence states and the manner in which states exercise their sovereignty).

85. Trimble, *supra* note 1; Weisburd, *supra* note 18 (discussing issue from federal/state dichotomy, whereby applying custom can upset the federal balance).

86. Or even by the Executive branch, upon considering the rule that a new state is bound by the previously developed standards of custom. For example, this automatic application of

minority opinion in the *Shtampfer* decision,⁸⁷ where Israel Supreme Court Justice Goitein noted that only the legislature may create internal legislative changes. Additional domestic policy issues, such as disruption of a state's foreign policy due to enforcement of an international custom, forcing the court to decide a political question, or the importance of national security⁸⁸ are also factors that a state can raise when considering the enforcement of custom in the domestic sphere.

Some commentators have addressed the counter-majoritarian problem by noting that domestic courts serve as the best forum within which to confront issues of applicability.⁸⁹ Courts attempt to adhere to predetermined principles, be it a domestic or international source, without any involvement in the underlying political debate.⁹⁰ Even regarding domestic issues, courts must address cases that are not based on a particular law such that a court must make recourse to their own presumptive powers.

Additionally, one can interpret the application of a customary norm within the domestic sphere as a means of completing the obligation created by custom. An inherent problem with custom is that the subjective element of *opinio juris* implies that an obligation already existed, thereby rendering the customary obligation redundant.⁹¹ However the *obligation* created by a

custom poses a problem for the People's Republic of China since they desire to rely on their own sovereign actions. ZHAOJIE, *THE ROLE OF DOMESTIC COURTS IN THE ADJUDICATION OF INTERNATIONAL HUMAN RIGHTS: A SURVEY OF THE PRACTICE AND PROBLEMS IN CHINA*; *supra* note 36, at 329.

87. *Shtampfer v. Attorney General*, 10 PD 5 (1956); *See also*, Justice Shamgars reasoning in *Afu et al. v. Commander of IDF Forces in the West Bank et al.*, 42(ii) PD 169 (1988).

88. These issues have been noted by Professor Eyal Benvenisti in *THE ATTITUDE OF THE SUPREME COURT OF ISRAEL TOWARDS THE IMPLEMENTATION OF THE INTERNATIONAL LAW OF HUMAN RIGHTS*; *supra* note 36, at 207.

89. This is the practice for example in Germany where the Constitutional Court interprets what is custom.

90. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L. J. 2277 (1991); FRANCK, *POLITICAL QUESTIONS AND JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)

91. Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75); CHENG, *CUSTOM: THE FUTURE OF GENERAL STATE PRACTICE IN A DIVIDED WORLD* 513 (Macdonald & Johnston eds., 1983), which addresses this conflict by noting how legal norms are abstract rules that are intended to predict behavior by exerting a psychological pressure on a state's future behaviour. Walden, *The Subjective Elements in the Formation of Customary International Law*, 12 ISR. L. R. 344 (1977) notes that custom creates a normative standard resulting from internal attitude of states towards a rule.

customary norm can become an obligation deriving from custom once enforcement of the norm occurs within the domestic sphere.⁹²

In considering the role of custom in Israel, it is possible that deriving the obligation from a domestic enforcement of the norm can have particular relevance for international human rights obligations, where international commentators tend to rely on *opinio juris* as a primary source of custom.⁹³ Recognizing the appropriateness of a particular pattern of behavior, the *opinio juris* crystallizes a variety of state perceptions towards a particular norm. The norm inclines a state to alter its practice according to the norm, particularly as states make an empirical judgement to acquiesce and subscribe to the rule.⁹⁴ The combination of *opinio juris* and state practice as binding the state in a normative sense, rather than merely reflecting or declaring a desired standard,⁹⁵ can occur by way of the domestic legal grounding of the norm⁹⁶ that will serve to solidify the norm.

Similarly, international human rights treaties can serve to embody the elements of custom and provide a court with a reference to principles of law by declaring a previously created customary rule, crystallizing an emerging rule, or generating a new rule of custom.⁹⁷ As treaties enunciate norms in a clear fashion, the emergence of a customary norm is easier to detect, particularly as the customary norm develops over a time.⁹⁸ For example, one can refer to a multilateral treaty as a source of emerging customary law where the underlying goal of the treaty is to create a universal consensus among the signatory nations. While the obligation to

92. Walden, *supra* note 91, alludes to this approach by distinguishing a claim that a rule is binding from the eventual legal application of the rule in accordance with the proposed custom. See also, Maluwa, *Custom Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law*, 6 AFRICAN J. INT'L & COMP. L. 387 (1994) for an explanation of Finniss' approach to this conundrum.

93. Indeed Cheng, *supra* note 91, focuses almost exclusively on *opinio juris*, noting that state practice will be altered in accordance with a state's acceptance of an obligation.

94. See Maluwa, *supra* note 92, at 402 (noting the importance of authoritative rules as exclusionary reasons for action, particularly where the state acts in the absence of any clear or understood reason).

95. See, e.g., Bodansky, *supra* note 2.

96. Walden, *supra* note 91, approaches custom as both a primary and a secondary norm that raises the level of obligation to a greater status than mere declaration and action.

97. Schachter *Entangled Treaty and Custom in International Law at a Time of Perplexity* (Dinstein & Tabory eds., 1989) (citing North Sea Continental Shelf Case FRG v. Denmark; FRC v. Netherlands) ICJ Rep. (1969); Condorelli, CUSTOM IN INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (Bedjzoui ed., 1991). Baxter, *Treaties and Custom*, I RECUEIL DES COURS 25 (1970).

98. Meron, *The Geneva Convention as Customary Law*, 81 AM. J. INT'L L. 348 (1987) (citing Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (1986) ICJ Rep. 14 regarding Article 3 of the Fourth Geneva Convention, where the ICJ inferred it was custom yet travaux and prior usage were not so clear).

abide by the treaty derives from specific treaty rules,⁹⁹ the treaty may also indicate an emerging *opinio juris* of a state and influence subsequent state practice. Further, if a treaty creates a one-sided obligation on the state, such as a human rights treaty, the relevance of the *opinio juris* in forming the treaty will be quite significant in demonstrating the customary status of a rule. State practice serves a secondary role since the practice required by the treaty is, in itself, an obligation to alter one's practice. The binding nature of custom emerges as a state's intent becomes entrenched and a state's actions become influenced by the treaty.

Reflecting this approach are commentators who treat the two principal elements of custom as being in an inverse relationship to one another. Developing the grounds for demonstrating *opinio juris* heightens the role of *opinio juris* as a key element of customary law and proportionally lessens the necessity to turn to state practice.¹⁰⁰ This inverse relationship between the sources of custom, which the ICJ seems to support,¹⁰¹ is significant for instances where subsequent state practice contrary to an emerging customary rule does not create strong enough grounds to form a new customary norm upon considering the previous *opinio juris*.¹⁰² Such is the case with states recognizing norms as essential and basic to their survival or because states maintain deeply held and widely shared convictions, despite the possibility of contrary state practice subsequent to the development of the norm.¹⁰³ The utility in referring to treaties assists to demonstrate the emerging *opinio juris* in a clearer fashion than would a focus on state practice, particularly when addressing human rights norms.

The relationship between treaties and custom, whereby treaties assist to shape the emerging *opinio juris* of a state as well as influence subsequent

99. As a state signs and ratifies a treaty, the state is subject to the variety of obligations and requirements of the treaty, notably the *pacta sunt servanda* rule that binds the state to act in good faith to uphold even a non incorporated treaty. Vienna Convention on the Law of Treaties.

100. Schachter, *supra* note 97; Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987) (sliding scale based on particular norm at issue).

101. Schachter, *supra* note 97 (referring to the Corfu Channel Case (UK v. Albania), 1949 I.C.J. REP. 4, and the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. US), 1986 ICJ REP. 14). See also, *Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. Rep.

102. One of the problems with interpreting the central elements of custom in an inverse manner is that state practice can be unduly limited, thereby weakening the normative ground of custom. Weisburd, *supra* note 18. Some commentators refer to other international sources as a basis for developing human rights, such as the general principles of nations, Simma & Alston, *supra* note 1, or attempt to devise a new form of source of law, such as declarative international law. Bodansky, *supra* note 2; Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L. J. 87 (1991).

103. Schachter, *supra* note 97 (referring to prohibition against torture, large scale racial discrimination, genocide or killing prisoners of war. Schachter notes that rules are relative to their importance when considering their method of creation).

state practice, is particularly important upon considering the manner in which the Israel Supreme Court focuses on the state practice element of customary international law. The statements made by states during the drafting of a treaty that reflect an *opinio juris* can have greater significance towards the emergence of a customary law than would subsequent state practice. Indeed, some commentators assert that what is important in the creation of a customary law, particularly when considered alongside a treaty, are the statements made by the state during the drafting or subsequent statements upon ratification.¹⁰⁴ The statements indicate the intent by the states to create a binding obligation.

Nevertheless, one should be careful to avoid adopting what Professor Koskeniemmi has termed a *utopian* approach when referring to the *lex feranda* derived from a treaty negotiation.¹⁰⁵ The inclination is to infer a customary rule from state expressions in international forums, even without the required state perception of the rule as legally obligatory. Furthermore, a treaty rule operates in a similar manner to a customary rule since the interpretative process is a subjective exercise that is affected by the surrounding circumstances.¹⁰⁶

One can remove customary law from this purely naturalist framework by examining the underlying sources of *opinio juris* in a realist manner. That would not only include consideration of the practice of states, but also the manner by which a state incorporates the norms, as indicated by a treaty ratification or by a states denial of any normative breach of the relevant rule. A customary rule does not create a conclusive means of domestic application and interpretation of the relevant rule upon considering the surrounding factors that have contributed to its creation.¹⁰⁷

At the same time, one should avoid an *apologist* approach¹⁰⁸ that reduces custom to a mere tacit agreement among states or equates it with a general principle of international law. The tendency can be to defer to the wishes of powerful states at the expense of any actual development of a customary rule from the overall will of the states. One can avoid this approach by considering the relevant international materials that serve as the substantive source, or *grundnorm*, for a customary law despite differing state practice. Where indications exist that states desire to establish a universal or broad rule, such as the ratification of a multilateral

104. Baxter, *supra* note 97; Akehurst, *Custom as a Source of International Law*, 47 BRIT. YB. INT'L L. 1 (1974-75); Cunningham, *supra* note 44.

105. MARTTI KOSKENIEMMI, FROM APOLOGY TO UTOPIA (1989).

106. Chin Lim & Olufemi Elias *The Role of Treaties in the Contemporary International Legal Order*, 66 NORDIC J. INT'L L. 1 (1997), referring to LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 73 (2nd ed. 1979).

107. *Id.*

108. Koskeniemmi, *supra* note 105.

treaty,¹⁰⁹ the subsequent conformance of state practice to the rule will be undertaken by states by way of different routes.

Regarding the mixed jurisdiction reasoning of the Israel Supreme Court, the role of custom under this rationale would involve addressing lacunae in the domestic law. Because domestic law can deviate from a customary norm, reference to international standards can serve as a means to an end in clarifying particular domestic laws. A court should not approach custom as a supra-national legislative source of law but as working in tandem with the domestic law, with a view towards ameliorating the international and domestic standards.¹¹⁰ This approach was noted by the Supreme Court in *The Queen of Right in Canada v. Edelson and others*¹¹¹ where the Court combined international and domestic principles to interpret the scope of restrictive immunity to be accorded to a state.

III. CONCLUSION

The aforementioned discussion regarding the reasons for upholding custom in Israeli domestic law indicates that the substantive basis of custom can allow for reference to norms deriving from international sources. The fact that the Israel Supreme Court has hesitated to apply customary norms due to its preference for strict state practice does not mean that customary international law is wholly inapplicable in the domestic law. Israel's jurisprudence can benefit from a broader reliance on customary international norms, particularly where the domestic legislation requires further interpretation. The Israel Supreme Court would do well to consider international developments that in a broader, and even more realist, sense indicate the actual practice of states.

Israel's ratification of the principal human rights treaties demonstrates the emergence of an acknowledgement by the state of its human rights obligations. International developments in the human rights context are beginning to play a role within the domestic jurisprudence of Israel, indicating the necessity for a broader approach to its obligations arising from customary international law. It therefore is imperative to consider situations where reference to customary international human rights law might assist these domestic developments.

109. For example, a state not to reserve on a provision within a multilateral human rights treaty that allow for a reservation demonstrates a state's intentions towards that provision as reflecting a customary rule. What is more important, one can interpret the other articles that do not provide for a reservation as reflecting custom, if associated with other customary provisions and if the travaux préparatoires to the treaty indicate the emergence of a customary norm. See, e.g., Baxter, *supra* note 97.

110. This demonstrates how custom and general principles differ in that determining the latter would require one to stand on the outside and look into the domestic sphere.

111. *Edelson*, *supra* note 71, 97(2) 5757/5758-1997.